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IN THE

Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

Appellant,

—against—

PIRANESI IMPORTS, INC.,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS

LEON DICKER
Counsel for Appellee
635 Madison Avenue
New York, New York

Of Counsel:

EDWARD NATHAN
MATTHEW ANENBERG
136 East 57th Street
New York, New York

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—against—

PIRANESI IMPORTS, INC.,

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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein, or in the alternative to affirm the orders below, on the following grounds: (1) The appeal does not present a substantial federal question (2) The federal questions sought to be reviewed were not timely or properly raised or expressly passed on by the Courts of New York (3) The orders rest on adequate non-federal grounds.

Questions Presented

1. Is there a substantial federal question where the record demonstrates that the appeal is taken frivolously and has no merit?

2. May the Supreme Court hear this appeal although the alleged federal questions have not been timely or properly raised nor have they been passed upon by the highest state court?

3. May the appellant prosecute this appeal where the orders below rest on adequate non-federal grounds?

Statement of the Case

After a trial of an action for goods sold and delivered, judgment was entered against Erwine Laverne, the appellant herein, and Furniture Textiles & Wallcoverings, Inc., formally Laverne, Inc., in the amount of $35,066.86. The judgment was affirmed on appeal. Subsequently the judgment-creditor, the appellee herein, took steps to enforce the judgment pursuant to Article 52 of the New York Civil Practice Law and Rules.

Initially, appellee attempted to examine appellant as a judgment-debtor. After trying to evade process, he was eventually subpoenaed. However, he failed to appear for the examination and an order was obtained adjudging him in contempt of Court. After appeals and applications for stays failed, appellant then appeared for his examination in order to purge himself of contempt. His patently evasive and incredulous answers and his failure to produce certain documents were a continuation of his plan to frustrate the collection of the judgment.

At his first examination, appellant testified in part that he received $89,000 as a result of a settlement of a claim for personal injury, all of which he gave to his son then living in Israel. He also stated that he has had no other source of income since then. He swore that he owned no property, real or personal, except 15 shares of stock in Piranesi Imports, Inc., which he did not produce at the

examination because he could not find the certificate. Appellant, a designer of furniture and interior decorations, further testified that he is not employed and lives from day to day on small loans from his wife.

Appellant also had incredible lapses of memory. For example, he did not remember whether he had borrowed money from anyone as recently as a month before, whether he had an interest in any life insurance po'icies, or whether he had filed a gift tax return reporting the alleged gift to his son. With respect to this gift, he did not even know the address of his son to whom he had allegedly made this gift and did not know the attorneys who obtained the settlement, or the insurance company involved.

It was discovered by independent investigation that he had caused his corporation, Furniture Textiles & Wallcoverings, Inc., also a judgment-debtor herein to make an assignment of its assets to his wife's corporation, Laverne International, Ltd. Furniture Textiles & Wallcoverings, Inc. was later adjudged bankrupt and the trustee in bankruptcy commenced a suit to set aside this transfer as fraudulent to creditors. It was also learned that, through the device of a credit card, he was charging some of his living expenses to his wife's corporation. Although he had testified that he had no job and received no compensation, his authority to charge these expenses was based on his being an "officer and/or agent" of his wife's corporation. Laverne International, Ltd., his wife's corporation is now in bankruptcy.

These and other tactics of the appellant were set forth in the affidavits in support of appellee's motion for the appointing of a receiver and a turn-over order. The motion papers were served on appellant's attorneys as of that time. However, appellant saw fit to change attorneys for the tenth time in this litigation. The new attorney

applied for an adjournment of both motions but his affidavit demonstrated that he had already been ill and was already in the process of moving his office when he accepted the retainer, that he had not received the file right away because the prior attorneys were holding it under an attorney's lien, and that, in effect, the application was merely another delaying tactic.

After the application for adjournment was denied, appellant submitted affidavits in opposition to both motions which adequately presented whatever defense appellant had. He did not raise any constitutional objections whatsoever. Appellee submitted a reply affidavit together with the transcript* of appellant's examination and other documentary evidence. On the basis of the affidavits, but primarily on the transcript of appellant's testimony, both motions were granted.

Appellant moved for reargument of the motion for a receiver and submitted a lengthy affidavit which again contained no Constitutional objections. The Court below, after considering these papers, again granted the motion.

Appellant thereafter appealed from these orders to the Appellate Division. In his brief he raised, for the first time and somewhat perfunctorily, the issue of a denial of due process as well as a host of other Constitutional objections, including a claim of cruel and unusual punishment. Appellee argued that these Constitutional issues could not be heard since they were not raised below and, in any event, were frivolous and completely without support. The Appellate Division affirmed the orders below without opinion.

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* Appellant refused to sign the transcript and, in any event, did not raise any objections to the accuracy of the transcript until an application was made to the Court of Appeals and therefore, any objection must be deemed to have been waived.

Thereafter, appellant made an application for reargument or for leave to appeal to the Court of Appeals. While this application was pending, a second examination was held at which appellant testified that most, if not all, of the $89,000 in question was not given to his son in Israel, but was actually deposited in a bank account in Switzerland under the name of himself, his wife, and three children, and that the money had been withdrawn and used by him over a period of years. Although this examination was not part of the original record, it was submitted to the Appellate Division in opposition to appellant's application. The application was denied without opinion.

The testimony from the second examination is significant because this appeal is being based mainly on the phrase "given by Erwine Laverne to his son, and fraudulently hidden or transferred." which is in the original order of the Supreme Court of New York. (Jurisdictional Statement, p. 3a) According to appellant, this merely descriptive phrase was in reality a finding by the Court that appellant had made a transfer to a third party to defraud creditors. In truth, no such finding was made. The "issue" of a transfer to a third person was never raised because no one, least of all the Court below, believed appellant had given the money to his son or any other third person. In other words, the phrase in question merely identifies those moneys which appellant had falsely testified were given to his son, but were actually removed and concealed somewhere. The testimony from the second examination bears this out completely.

Moreover, this alleged finding was not material to the motion for a receiver and did not have to be made in order for the Court to reach its decision. Obviously, a proceeding under §5228 of the CPLR is not one to set aside a fraudulent transfer. The phrase in question was

placed in the order to describe what property the receiver was to receive, as required by §5228.

Therefore, the alleged issue of a fraudulent transfer which was supposedly decided on affidavits without a trial actually does not exist. The other claimed issues arising from these motions were collateral to the determination of the motions and, in any event, do not require a full trial for their resolution.

Appellant made another application to the Court of Appeals for leave to appeal further, arguing the same Constitutional grounds. It was denied without opinion.

ARGUMENT

1. This Appeal Does Not Involve Any Substantial Federal Questions.

Rule 16(b) of the Revised Rules provides that an appeal shall be dismissed on motion where no substantial federal question is involved in the appeal. This Court has refused to take jurisdiction where (a) the federal question has been so foreclosed by prior decisions that there is no need for further argument (*Zucht* v. *King,* 260 U.S. 174) or (b) the appeal has so little merit or substance that further argument or exposition would be superfluous (*Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308). After an examination of the facts and the record below, it will appear that this appeal has been taken frivolously and that the claimed federal questions lack substance.

To begin with, prior decisions of this Court have foreclosed further argument of the matters raised herein. That the use of affidavits to determine the rights of litigants to property is Constitutional needs no authority. The Federal Rules of Civil Procedure are replete with such

summary procedures. If it is not a denial of due process to render final judgment on affidavits alone under Rule 56 of the Federal Rules of Civil Procedure, certainly the appointment of a receiver or a turn-over order in enforcement proceedings after a judgment has already been rendered cannot be a denial of due process. It has been held that the appointing of a receiver, based presumably on affidavits only, does not create any substantial federal question. *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 112; *St. Louis G. & Ft. S. Ry. Co.* v. *Missouri,* 156 U.S. 478.

In any event, it is submitted that there is no merit whatsoever to this appeal. It is axiomatic that due process is concerned with the substance of the procedure in question, not the form. So long as adequate notice, a hearing and an opportunity to be heard is afforded, there is no conflict with the due process clause. What constitutes a sufficient hearing or opportunity to be heard is based on the type of proceeding involved and the nature of the rights to be determined. *Hurwitz* v. *North,* 271 U.S. 40.

§5228 of the CPLR provides for the appointing of a receiver in the Court's discretion, on affidavits, where it is clear that a receiver would aid in satisfying the judgment. It is not a proceeding to declare and set aside transfers to third persons as being fraudulent and no such issues are germane to the proceeding.

Under §5225(a) of the CPLR the Court is enpowered to order property in the possession of the judgment-debtor turned over to the sheriff or a receiver. The affidavits need only show the property is in the hands of the judgment-debtor. Any issues with respect to value or the motives of the judgment-debtor in making the motion are entirely irrelevant.

The proceedings under these sections are merely tools for the enforcement of judgments and as such are summary

in nature. Appellant has not shown, nor can he show, the need for an opportunity to cross-examine witnesses or attack credibility through demeanor evidence in this type of proceeding. See *Colby* v. *Klune,* 178 F. 2d 872 (2nd Cir. 1949) and *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96.

Contrary to appellant's contention, §5228 does not involve, by any rational interpretation, the issue of whether a transfer to a third person occurred and, if so, should it be set aside as fraudulent to creditors. This Court will accept a state court's interpretation of a state statute and will assume that if several interpretations are possible the state court construed it in a way that will avoid Constitutional conflicts. *Bratton* v. *Chandler,* 260 U.S. 110. Therefore appellant was not denied due process by virtue of the construction and application of these statutes by the Court below.

It is submitted that the issue with respect to a "fraudulent transfer" was manufactured by Appellant to create some semblance of a due process question. Obviously, the introduction of a due process issue into an essentially non-federal matter does not automatically create a substantial federal question. *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.,* 243 U.S. 157; *McDonald* v. *Oregon Railroad & Navigation Co.,* 233 U.S. 665; *Bowe* v. *Scott,* 233 U.S. 658. As can be seen from the record herein, this "issue" is in reality a sham and without any factual support whatsoever. Certainly this Court will dismiss an appeal where the record does not factually and legally support the alleged federal question. *New Orleans* v. *New Orleans Water Works Co.,* 142 U.S. 79; *Consolidated Turnpike Co.* v. *Norfolk & O.V. Ry. Co.,* 228 U.S. 596.

The alleged federal question arising under §5225(a) as to whether a trial is necessary under the due process clause is similarly without any substance.

Concerning the alleged violation of appellant's right to meaningful representation by an attorney by virtue of a denial of adjournment, it is submitted that this is another frivolous argument. Appellant's new attorney obviously had adequate time to prepare and submit an affidavit in opposition and, in any event, was later given the opportunity to submit another lengthy affidavit on reargument. It is nonsense to contend that Appellant was denied adequate representation under these circumstances or to compare the case at bar with cases involving the right to counsel in the various stages of criminal type proceedings. The facts of this case demonstrate without any doubt that the denial of the adjournment was not arbitrary. Thus the "issue" of whether Appellant had meaningful representation is without any substance and requires no further consideration by this Court.

Appellant is proceeding by appeal on the basis of alleged issues involving the unconstitutionality of State statutes (Jurisdictional Statement, p. 4-5). Since these issues do not involve a substantial federal question, and since the other question is conceded to be not reviewable except by the granting of certiorari, the entire appeal must be dismissed as to all grounds. *Zucht* v. *King, supra.*

2. The Alleged Federal Questions Were Not Timely or Properly Raised or Expressly Passed On.

The claim of a denial of due process and numerous other Constitutional objections were first urged in Appellant's brief before the Appellate Division. Appellee argued in its brief in opposition, among other things, that having failed to raise questions as to the Constitutionality of

§5228 and §5225(a), the Appellate Division could not hear these questions. The Appellate Division affirmed without opinion. In Appellant's applications for reargument and for leave to appeal to the Court of Appeals, which were denied without opinion, the same Constitutional issues were urged as requiring the consideration of a higher Court.

It is a well recognized principle that a federal question must be raised at the first opportunity and preserved throughout the various stages of the litigation. The raising of a federal question for the first time after a final judgment on an application for reargument is not timely and does not sustain this Court's jurisdiction, *Miller* v. *Texas*, 153 U.S. 535, particularly where the application is denied without opinion. *Pim* v. *St. Louis*, 165 U.S. 273; *American Surety* v. *Baldwin*, 287 U.S. 156. It is apparent therefore that the alleged Constitutional issues urged by Appellant here as a basis for this Court's jurisdiction have not been timely raised.

Moreover, it is clear that Appellant has not followed the law of New York in attempting to raise these federal questions in the Appellate Courts of New York. Where a federal question is not raised in accordance with the state law so that the state appellate courts would refuse to consider it, this Court will not assume jurisdiction. *Erie Railroad* v. *Purdy*, 185 U.S. 148; *Bailey* v. *Anderson*, 326 U.S. 203. Although this Court will assume jurisdiction if the highest state court does consider the federal question even though raised improperly, where the highest court is silent as to whether it considered the federal question, it is presumed that the state court has not considered it. *Chicago I. & L. Ry. Co.* v. *McGuire*, 196 U.S. 128.

The law of New York specifically requires that Constitutional issues must be raised in the Court of first instance

before the Court of Appeals may consider them. §5601(b) states that:

> "An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States."

In general, it has been widely held that issues not raised below may not be decided on appeal even if they concern violations of due process. *Eddy, Inc.* v. *Fidelity & Deposit Co.*, 265 N.Y. 276, 192 N.E. 410 (1934); *Von Diezelski* v. *Food Fair Stores*, 18 A.D. 2d 724, 236 N.Y.S. 2d 603 (1962); *Robusto* v. *Tibbets*, 277 A.D. 1008, 100 N.Y.S. 2d 370 (1950). Consequently, it is clear that the alleged federal questions have not been properly raised and it must be presumed that the Appellate Courts of New York have therefore refused to consider them.

In addition to the fact that the alleged federal questions were neither timely nor properly raised, they were never expressly passed upon by the Courts of New York. In order for this Court to obtain jurisdiction, the federal question must have been actually decided and the decision must be necessary to the final determination of the case. *Marrow* v. *Brinkley*, 129 U.S. 178; *New York ex rel Rosevale Realty Co.* v. *Kleinert*, 268 U.S. 646.

If the highest state court is ambiguous or silent, something in the record must indicate that the state court was

presented with and asked to resolve the federal question. *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626. In the case at bar, neither the Appellate Division nor the Court of Appeals rendered any opinions. However, since the record below was devoid of any federal issues (Appellate briefs not being considered as part of the record for this purpose), it must be assumed that the Courts of New York did not pass on the alleged federal questions. *Black* v. *Cutter Laboratories*, 351 U.S. 292; *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52. Any ambiguity with respect to the action taken by the highest state courts will be resolved against the Appellant who has the burden of demonstrating that a federal question was presented and necessarily decided. *Stickney* v. *Kelsey*, 209 U.S. 419.

In any event, the record herein is not ambiguous and clearly indicates that this appeal must be dismissed. In *Mellon* v. *O'Neil*, 275 U.S. 212, this Court refused to assume jurisdiction under nearly the same circumstances as the case at bar.

3. The Orders Below Rest On Adequate Non-Federal Grounds.

It is a long established principle that an appeal must be dismissed where an order or judgment below rests on adequate non-federal grounds, even if a federal question had been raised below. *Eustis* v. *Bolles*, 150 U.S. 361. When the record indicates that no federal question was raised or expressly decided and the judgment clearly rests on adequate non-federal grounds, this Court must refuse to hear the appeal. *Lynch* v. *New York ex rel Pierson, supra; Black* v. *Cutter Laboratories, supra.*

In order to be "adequate", the non-federal ground must be not only independent but also tenable. A non-federal ground is independent where the analysis or reasoning of

the highest court in reaching a determination, as indicated in its opinion or from the record, does not depend upon or become interwoven with the resolution of any federal questions. *Fox Film Corp.* v. *Muller*, 296 U.S. 207; *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co., supra.* In determining whether a non-federal ground is tenable, this court will not overrule a state court's decision even if it is open to question, unless the non-federal ground is so erroneously, unfairly, or unreasonably decided that it is clear the state court is attempting to prevent the review of a substantial federal right. *Leathe* v. *Thomas*, 207 U.S. 93; *Vandalia Railroad* v. *South Bend*, 207 U.S. 359; *Broad River Power Co.* v. *South Carolina ex rel Daniel*, 281 U.S. 537.

Based on the above principles, it is submitted that the decisions granting the orders below, as well as the denial of an adjournment, were based on independent and tenable non-federal grounds, namely that the Appellant's own conduct and testimony had demonstrated the need for a receiver and a turn-over of the stock certificates. Nowhere in the motion papers was there any assertion of a Constitutional right, so that the Court below could not have based its decision on the resolution of any federal question.

The alleged Constitutional questions were first raised in Appellant's brief before the Appellate Division. It is apparent that the affirmance of the orders below without opinion was based in part on the independent ground that the alleged Constitutional issues had not been raised in the Court below and could not be decided on appeal. Subsequent applications for reargument and for leave to appeal, further urging the existence of Constitutional questions for decision, were denied without opinion. Under these circumstances, there is a presumption that these decisions were based strictly on non-federal grounds also.

Bachtel v. *Wilson*, 204 U.S. 36. Therefore, it is submitted that this appeal must be dismissed.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or, in the alternative, the orders of the Court below should be affirmed.

March 30, 1967

LEON DICKER
Attorney for Appellee
635 Madison Avenue
New York, New York

Of Counsel:

EDWARD NATHAN
MATTHEW ANNENBERG
136 East 57th Street
New York, New York